No. 10349

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ASSOCIATED INDEMNITY CORPORATION, a corporation,

Appellant,

vs.

LAWRENCE P. BUNNEY, as Guardian of WILMER BUNNEY, a minor,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

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APPELLEE'S BRIEF

WELTS & WELTS,
HENDERSON & McBEE,
Attorneys for Appellee.

Office and P. O. Address:
Mount Vernon, Washington.

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JURISDICTION

We are not questioning this court's jurisdiction.

STATEMENT OF THE CASE

The insurance policy involved here was issued and filed with the Department of Public Service of the State of Washington, to comply with mandatory provisions of statute law of that State and the departmental regulations formulated thereunder, as a prerequisite for Bunney to obtain his State Public Service permit whereunder he had been using the 1935 one and one-half ton dump truck in W. P. A. hauling.

(Plaintiff's Exhibit No. 1, Tr. 44; Plaintiff's Exhibit No. 2, Tr. 97.)

The statutory provision applicable thereto is found in Rem. Rev. Statutes Sec. 6382-16 or in the 1935 Session Laws of the State of Washington, Chapter 184, Section 16. It reads as follows:

> "Sec. 16. The department shall in the granting of permits to 'common carriers' and 'contract carriers' under this act require such carriers to either procure and file liability and property damage insurance from a company licensed to write such insurance in the State of Washington, or deposit such security, for such limits of liability and upon such terms and conditions as the department shall determine to be necessary for the reasonable protection of the public against damage and injury for which such carrier may be liable by reason of the operation of any motor vehicle.
>
> "In fixing the amount of said insurance policy or policies, or deposit of security, the department shall give due consideration to the character and amount of traffic and the number of persons affected and the degree of danger which the proposed operation involves."

In compliance with the statutory provision and departmental rules, this policy bore a compulsory insurance endorsement, (Tr. 59), making the coverage of the policy applicable to any automobile used by the named insured at any time during the policy period under his State permit, even if he did not own the vehicle so used.

The Department of Public Service endorsement (Tr. 62) unqualifiedly required the insurance company to pay any final judgment for bodily injury within the limits of coverage, which are not here in question, caused by any and all motor vehicles covered by the policy and endorsement and operated by the insured pursuant to his permit. The only exception is one riding in or upon, or entering in or alighting from the motor vehicle. It made the coverage applicable not only to the vehicle named in the policy but "any additional, emergency or substituted motor vehicle for a period of ten days from the date of beginning of use of such equipment" unless the same be covered by other insurance. (Tr. 64). It further provided that the policy "shall not expire nor shall cancellation take effect until after fifteen (15) days notice in writing by the company shall have first been given to the department." (Tr. 65). It also provided that "nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof by the insured, shall relieve the company from liability hereunder or from the payment of such judgment." (Tr. 63) This policy, with its endorsements, remained in full force and effect unvaried and on file with the Department at the time the injury in question occurred. (Tr. 96)

The injury to the child occurred on January 5th.

A few days before, Bunney had been negotiating with Pound Motor Company to purchase from it a 1938 truck consisting solely of a chassis and cab, with no box or bed of any kind thereon. (Tr. 172; 178). Pound in turn contemplated purchasing the 1935 truck from Bunney but not the steel bed thereon. Bunney was to keep that equipment, and intended to put it on the 1938 chassis and substitute it therefor on his dump-trucking work with W. P. A. Pound was to acquire a wooden truck body, then upon a third truck owned by Bunney Brothers. In determining how much he would pay therefor, Pound looked at this wooden truck body situated upon the third truck. (Tr. 176-7)

On January 4th, Bunney bought and took delivery of the 1938 chassis and cab. As a prerequisite to Pound becoming the legal owner of the 1935 truck with wooden bed, Bunney had to put this truck into deliverable shape and deliver it to Pound's place of business. This required that the steel bed be removed therefrom and that the wooden bed be taken from the truck, of which it was a part, and placed upon the 1935 vehicle, and that the vehicle be driven to Pound's garage and turned over to him, completing delivery. (Tr. 171-7; 177-81)

On January 5th, the day of the accident, pursuant to notice from the W. P. A. Authorities to assemble his equipment for inspection on a W. P. A. hauling

job in which Bunney had been using his truck under his dump-truck operation permit, he was in the act of moving the 1935 truck to take the steel body therefrom and put it on the 1938 chassis and put on the wooden body and deliver the 1935 truck to Pound when the child was hurt. (Court's certification of statement of facts on Pre-Trial Hearing, Tr. 37). After he moved the 1935 truck a few feet, one wheel bogged down in the street so the gas would not feed. He called the child, Wilmer Bunney, who was playing basketball in an adjoining yard. After the second call, the child came. Bunney gave him a tomato can of gasoline, removed the flame arrester from the truck carburetor, and the child leaned across the fender of the truck, with one foot on the ground or dangling, and poured the gasoline into the truck carburetor. (Tr. 38; Tr. 164) The one sitting at the wheel of that truck in the driver's seat, stepped on the starter of the 1935 truck; the motor backfired; the gasoline ignited or exploded and the child was burned. (Tr. 167)

Judgment was recovered against Bunney for that injury. This suit was brought on that judgment, removed from the State court to the United States District Court, and there tried before the Honorable Jeremiah Neterer and a jury. From judgment entered upon the jury verdict in the sum of $3780.00 and costs, this appeal was taken.

SUMMARY

The insurance did not shift from the truck by which the child was injured because the automatic clause did not become operative prior thereto. Bunney still owned the 1935 truck as found by the jury, and the new equipment was a bare cab and chassis. It had not legally or actually replaced the 1935 truck and could not be classified as capable of conducting dump-truck operations without a bed or dump box being placed thereon. That bed was still on the 1935 vehicle.

The Public Service and Compulsory Insurance Endorsements required by State law and departmental regulations foreclose this question.

Under the sale and purchase agreement made between Bunney and Pound for the 1935 truck, legal title had not passed to Pound but was in Bunney because the property was to be put in deliverable shape by Bunney. This required that he remove the steel bed therefrom which he was to retain and place upon the new 1938 chassis. It also required that he take the wooden bed from the third truck, place it on the 1935 truck and deliver the equipment to Pound's place of business before it became Pound's property. The Uniform Sales Act of Washington, and decisions of the Supreme Court of that State, make

the question of when the parties intended legal title to pass a factual one for determination by a jury, and the jury found title had not passed. Transfer of the registration certificate does not necessarily pass legal title. It is only evidence of intention to be considered with all other evidence in determining the ultimate fact.

As a matter of law, the child was not within the Passenger Hazard Exclusion. He was not going to be conveyed anywhere.

He was not an employee. One performing a casual, gratuitous service is not an employee within the meaning of such an exclusion clause. He was not operating the vehicle. He had nothing to do with the mechanism of the truck, actively or by direction. He was pouring a tomato can of gasoline into the carburetor at the request of the owner who was directing another in the driver's seat as to the operation of the vehicle.

The question of defendant being prejudiced because the owner delayed a few days in giving notice of the injury, is no defense under the endorsements on the policy. Also, it had no foundation in fact as defendant advised the court at the pre-trial conference that there were no facts indicating any prejudice. It made a full, complete and thorough investigation, interviewed all

witnesses, and every fact in existence was at its command. It offered no evidence. Its exceptions to the instruction on this subject matter were not sufficient. It proposed no instruction upon this subject matter except the one asking that it be found as a fact that it had been prejudiced in its investigation, whereas there was no fact to warrant such an instruction.

ARGUMENT

Appellant has argued seven points upon which it asks reversal of this judgment. For continuity in this brief, we shall answer them somewhat out of order, but give each its appropriate heading.

I.

AUTOMATIC INSURANCE FOR NEWLY ACQUIRED AUTOMOBILES

This is Paragraph V of appellant's policy. The principal argument on this appeal is based thereon. It is claimed that the original vehicle, the 1935 dump truck which caused the injury, was not covered by the policy because of this provision. Particularly, it is claimed that the coverage shifted to the 1938 vehicle before the accident occurred.

Paragraph V is quoted fully at page 78 of the Transcript of Record. The pertinent parts are:

> "If the Named Insured who is the owner of the automobile acquires ownership of another automobile, such insurance as it afforded by this policy applies also to such other automobile as of the date of its delivery to him, subject to the following additional conditions . . . . (2) . . . . insurance applies to such other automobile if it replaces an automobile described in policy and may be classified for the purpose of use stated in the policy, but only to the extent applicable to the replaced automobile; (3) the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery."

The truck insured under the policy was a 1½ ton Ford dump truck used by the insured as a trucker employed to do W. P. A. hauling and was so designated in the policy. (Tr. 67) In using the dump truck on this work he had to and did procure a permit from the Department of Public Service of the State of Washington on October 16, 1939. He operated thereunder as authorized therein:

> "Intrastate, irregular route, non-radial service as a carrier engaged in dump truck operations, in King, Snohomish and Skagit Counties."

Plaintiff's Exhibit No. 1, (Tr. 45) To procure this permit, under the State statutes, Rem. Rev. Stat. 6382-16 and rules promulgated thereunder by that department, Bunney had to and did procure and file for the protection of the public this policy of liability insurance. Plaintiff's Exhibit No. 2. (See Tr. 99-111)

The day before the accident, Bunney bought of

Pound Motor Company and drove home another truck, consisting solely of an engine, chassis and cab. It had no bed or body whatsoever upon it. (Facts certified on Pre-Trial Hearing, Tr. p. 34-40; See p. 37, 38. Testimony G. A. Pound: Tr. 172; Testimony Orville Pound: Tr. 178.) This is the equipment referred to as the 1938 truck. The steel dump box or bed which at the time of accident had not yet been removed from the original truck, was to be placed upon the 1938 chassis so it could be used by assured in his dump truck operations. A separate wooden truck body owned by Bunney and then upon a third truck, where Pound had inspected it in negotiating for the purchase of the 1935 truck, was to be removed and placed upon the 1935 vehicle and when thus assembled, it was to be delivered by Bunney to Pound's place of business in completion of the sale of that equipment to Pound. (Facts certified on Pre-Trial Conference, Tr. 34-40; Testimony G. A. Pound, Tr. 171-7; Testimony Orville Pound, Tr. 177-81.)

This coverage did not shift from the original dump truck to the 1938 chassis before the injury to the child, because:

(1) Under the terms of that paragraph, the new vehicle must replace the old one. The bare chassis and cab had not replaced and could not replace the dump truck. (2) The chassis and cab was not and

could not "be classified for the purpose of use stated in the policy." It could not be classified as a dump truck to do W. P. A. hauling.

The case of **Mitcham v. Travelers Ind. Co. (C. C. A. 4) 127 Fed. (2d) 27,** is directly in point. There, one Gray owned a Buick automobile upon which he procured a liability policy. He then bought and used a Lincoln Zephyr. He had placed the Buick in storage and gave the bailee authority to sell it if he could, but was still the legal owner. It was contended that the insurance had automatically shifted to the new car at delivery thereof, exactly as appellant contends here. This was denied by the insurance company, as it would be denied and successfully by appellant had the 1935 truck with chassis injured this boy. The court held that there had been no replacement of the Buick by the Lincoln, and hence the coverage remained upon the Buick and was not on the Lincoln. The court said:

> "Gray still retained title to the Buick and full control over it. At any time he could have taken it from the custody of the Motor Company and put it into use; at any time the Motor Company was privileged to use the car on Gray's behalf in order to demonstrate it to a customer; and in either case it would have been impossible for the company to show that the car was not still covered by the policy if an accident had occurred and liability on Gray's part had ensued. These circumstances distinguish the case from

> Merchants Mutual Casualty Co. v. Lambert, 90 N. H. 507, 11 A. (2d) 361, 127 A. L. R. 483, upon which the appellant mainly relies, for in that case, although the old car covered by the policy remained in the insured's garage, with license plates attached, after the purchase of the new car, it had not been used by the insured for several months prior thereto, because it was worn out, out of repair, and not fit to be driven on the public highway. It was upon these facts that the court held that a transfer of insurance took place under the replacement clause despite the retention of ownership and possession of the old automobile by the insured."

The cases are very few dealing specifically with such a provision in a liability insurance policy. We have been able to find none sustaining appellant's position. There is one other which we feel sustains ours. That is **Thompson v. State Automobile Mutual Ins. Co., (W. Va.), 11 S. E. (2d) 849.**

One Smith owned and operated six gasoline tank trucks. They were covered by a liability policy containing the same automatic transfer clause. On December 30th, he bought a new truck, with chassis only. There was no tank upon it to convey gasoline. On January 7th, he obtained a license and thereafter used the vehicle to do limited hauling, but not of gasoline.

On March 5th, one of his six tank trucks was damaged beyond repair. He salvaged the tank therefrom and placed it upon the new truck chassis. It was then

put into use, becoming the sixth tank truck. On March 8th it ran over the plaintiff. On March 9th, the insurance company was notified of the substitution.

On suit, the insurance company claimed the truck was not covered by the policy; that the automatic insurance had not transferred to it; that to make the substitution effective, notice thereof should have been given within ten days after December 30th.

The court held that the truck was covered. The replacement occurred when the owner placed the tank from the other truck thereon so that it was capable of use and was used in the same capacity as the former vehicle. The period of ten days for notice ran from that time, rather than from the 30th of December when the owner bought and took delivery thereof.

Clearly the reasoning of that court is pertinent here. The replacement, within the meaning of the very clause here in question, did not occur until the truck was capable of doing the work of the old one and was actually put to the same use. This it could not do without the tank being placed thereon. Here, a bare chassis and cab did not and could not perform the classified purpose of the 1935 vehicle, namely, haul dirt as a dump truck until a dump body was placed thereon.

The cases cited by appellant upon this point are readily distinguishable upon the facts. **Merchants Casualty Co. v. Lambert, (N. H.), 11 Atl. (2d) 361,** is distinguished by the court in the Buick case supra. There a finding of fact was made that a new Pierce Arrow car had completely replaced an old discarded one "for the very same use previously made of the 1930 automobile." It was held that as this finding was fully sustained by the evidence, it followed as a logical conclusion that one injured by the new car had the protection of the carrier's policy.

There was a similar finding of replacement in use in **Dean v. Niagara Fire Ins. Co., (Cal.) 68 Pac. (2d) 1021.**

Ash-Grove Lime & P. Cement Co. v. Southern Surety Co., (Mo.), 39 S. W. (2d) 434, is not in point. It merely holds that under a fleet policy, an added vehicle under the provisions of the contract is also covered when the additional vehicle is acquired. It does not involve claimed termination upon the original vehicle.

Aetna Casualty & Surety Co. v. Chapman, (Ala.), 200 So. 425, announces the familiar rule that insurance policies must be liberally construed in favor of the insured.

Jamison v. Phoenix Indemnity Co., 40 Fed. Supp.

87, (App. Brief 41), holds that insurance does not automatically switch from the named vehicle to a new one, even if it has replaced the old one in use, unless the insurance company makes proof at trial that within ten days of the delivery of the new equipment, the insured gave notice of its acquisition to the insurance company. Subdivision (4) of the Automatic Provision, specifically provides that "this agreement does not apply" unless such notice be given.

In accord therewith see, also, **Mitcham v. Travelers Ind. Co., 127 Fed. (2d) 27, supra.**

(2) The second reason why the 1935 truck was covered by this insurance policy lies within the policy itself. For an added premium paid by insured, this policy as on file with the Department of Public Service, bore a Compulsory Automobile Insurance Endorsement issued December 14, 1939, (Tr. 59), and the Department of Public Service Endorsement required by law and State regulation previously mentioned. (Tr. 62) The first of these provided pertinently:

> "The insurance applies to any automobile or trailer used by the Named Insured at any time during the policy period under the Insured's Certificate of public convenience or necessity or permit issued in compliance with any federal or state law . . ." (Tr. 59)

The compulsory Public Service Endorsement provided:

"The policy to which this endorsement is attached is written in pursuance of and is to be construed in accordance with Chapter 184, Laws of 1935, of the State of Washington, and acts amendatory thereof and supplemental thereto, and the rules and regulations of the Department of Public Service of Washington adopted thereunder. The policy is to be filed with the state in accordance with said statute.

"In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to pay any final judgment for personal injury, including death resulting therefrom, and(or) damage to property (excluding cargo) of any person or persons other than the Insured, caused by any and all motor vehicles as defined by said Chapter 184 of the Laws of 1935, covered by the terms of this policy and endorsement, and operated by the Insured pursuant to a permit issued by the Department of Public Service of Washington in accordance with said above named chapter, and acts amendatory thereof and supplemental thereto, within the limits set forth in the schedule of insurance hereinafter set forth; and further agrees that upon its failure to pay such final judgment said judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment. Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof by the Insured shall relieve the Company from liability hereunder or from the payment of such judgment.

"In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to cover, in addition to the motor

vehicles named in the policy, any additional, emergency or substituted motor vehicles for a period of ten days from the date of beginning of use of such equipment; Provided, however, That in no event shall the automatic coverage extend to such additional, emergency or substituted motor vehicles if they are already covered by other valid insurance for limits of liability equal to or in excess of the limits required by said statute and the rules and regulations of the Department.

"The policy to which this endorsement is attached shall not expire, nor shall cancellation take effect, until after fifteen (15) days' notice in writing by the company shall have first been given to the Department of Public Service of Washington at its office in Olympia, Washington, said fifteen days' notice to commence to run from the date notice is actually received by the Department.

"Nothing herein contained shall be held to waive, alter, vary or extend any of the conditions, agreements or limitations of the Policy, other than as above stated." (Tr. 62-6)

Mr. Blashfield, in his work on Automobile Law, states the rule applicable to such insurance riders as follows:

"By the attachment of a rider, however, the insurer may signify its willingness not to limit the insurance to the particularly specified vehicle, and this rider will be effective, as where the insurer attaches the rider provided for in some jurisdictions, known as the Public Service Commission rider, to a policy covering a particularly described motor vehicle, the effect of such a rider being to waive the description of the particular

> car, and agree to make compensation to persons negligently injured or killed from operation of any motor vehicles belonging to or operated by the insured." **6 Blashfield, Sec. 3963, page 346.**

It thus appears that under the policy itself, as required by State law and regulation, this child was entitled to the protection of appellant's policy if Bunney owned the 1935 truck at the time of accident; and, similarly, under the "Compulsory Insurance Endorsement" as long as he was using it by authority of his permit whether he owned it or not.

Statutory requirements and departmental rules promulgated thereunder requiring the filing of such policies as a prerequisite to an operating permit, become a part of the policy.

> **6 Blashfield, Enc. of Automobile Law and Practice, Sec. 3891, page 305.**

If there be conflict between the policy and the rider, the rider will control.

> **6 Blashfield, Enc. of Automobile Law and Practice, Sec. 3892, page 305-6.**

II.

NOT OPERATING UNDER PERMIT

While counsel states baldly that Bunney was not operating under the public service permit, the assumption is not founded in fact. The certificate of Judge Neterer, certifying facts determined by him at the

Pre-Trial Conference, covered this situation. The full facts were disclosed to the Court at that conference. The certificate states:

> "It is agreed that on the 5th day of January, 1940, pursuant to notice from the W. .P A. Authorities to assemble his equipment for inspection on a W. P. A. hauling job in which the Bunneys, including David Bunney, were to use David Bunney's truck under Public Service Certificate, David Bunney with the assistance of his brother Daniel Bunney started to move the 1935 truck so that the steel body could be taken therefrom and put on the 1938 chassis and the wooden body could be placed on the 1935 truck and it could be delivered to Pound Motors.
>
> "After he had moved the 1935 truck a few feet one of the wheels bogged down causing the vehicle to tilt so that the gas would not feed and the motor would not run. Thereupon David Bunney got the 1938 chassis and cab, called the 1938 truck, and hitched on to the other truck and attempted to pull the vehicle out, by means of a physical connection between the two trucks." (Tr. 34-40)

Thereupon the injury to the child occurred through the ignition of the gasoline.

It is apparent, therefore, that in conjunction with the Bunney hauling operations which he had been conducting under his permit, the W. P. A. Authority had ordered him to assemble his equipment for inspection. In complying with that order and in so assembling his equipment, the accident occurred. He was operating under the permit as completely as

though he had a load of gravel upon his vehicle, hauling it upon the job. He was operating under the permit when he was doing any work required thereunder. He was complying with an order directly relating to the work for which the permit was issued, when injury occurred.

III.

PASSENGER HAZARD EXCLUSION CLAUSE

The policy contains such a clause removing from its operation one entering upon, riding in or alighting from the automobile. It is designated in bold-faced type "Passenger Hazard Exclusion Clause."

While Judge Neterer referred to a passenger in the ordinary sense as being one carried in a public conveyance, the simple fact is that as a matter of law, this child was in no sense a passenger. Neither he nor the vehicle intended to go or carry anyone anywhere.

In **Bommarito v. North American Accident Ins. Co., 295 N. Y. S. 624,** the insured used a truck which, in order to operate a buzz saw, was jacked up on blocks. It fell from the blocks and the insured fell from the truck, suffering injury. He tried to recover under the policy, claiming that the terms thereof covered bodily injury sustained by wrecking or dis-

ablement of a motor truck within which he was riding, or by being accidentally thrown therefrom. It was held that he could not recover because he was not "riding" in the truck. The court held that the word "ride" was used as an intransitive verb, meaning to be carried in any kind of a vehicle or carriage.

See, also, **Christ v. Chicago, Northwestern R. Co., (Minn.), 224 N. W. 247.**

Even a guest actually riding in a vehicle has frequently been held not to fall within such a passenger-hazard exclusion provision.

6 Blashfield, Sec. 3995, p. 366.

See, also, **Arms v. Faszholz, 32 S. W. (2d) 781.**

A passenger is defined as:

> "One who travels by such established conveyance; a person conveyed on a journey; a traveler." **47 C. J. 1374.**

To acquire a passenger status, one must be conveyed or intend to be conveyed or be in the act of taking passage somewhere.

Strickland v. Davis, 128 So. 233;

State v. Rector, 40 S. W. (2d) 639;

Villa v. United Elec. Rys., 155 Atl. 366;

See, also, **Gregg v. Northern Pacific R. Co., 49 Wash. 183, 94 Pac. 911;**

McIlwaine v. Tacoma R. & Power Co., 72 Wash., 184, 139 Pac. 193;

Dahline v. Seattle, 165 Wash. 683, 5 Pac. (2d) 1010;

10 Am. Jur., Sec. 953, page 26.

We are at a loss to understand what possible bearing the cases cited between pages 62 and 68 can have upon this question. Where one once becomes a passenger in a conveyance, there are many cases holding that protective coverage as to that one does not necessarily terminate when the vehicle stops. There are other cases holding that where one has acquired the passenger status, he often is entitled to protective coverage although the vehicle may be at rest. And, similarly, there are cases giving such coverage to one who has attained the passenger status although he is riding elsewhere than in the seat of the vehicle. But, in each instance, the vehicle was used or to be used to take a person somewhere and that one was a passenger. In dealing therewith Judge Neterer's comment is complete. "This was not such a case." (Tr. 199.) At the time of the accident, this vehicle was not used or to be used to convey this child anywhere. He was simply performing a gratuitous favor by pouring gasoline.

We feel that this contention is too fanciful to be given further serious consideration.

IV.

EMPLOYEE EXCLUSION

This child was not an employee within the meaning of this clause, nor at all. The Supreme Court of the State of Washington has specifically so held.

In **Braley Motor Company v. Northwest Casualty Co., 184 Wash. 47, 49 Pac. (2d) 911,** it was held that one who casually assisted in driving a truck gratuitously, was not an employee within the meaning of a clause excluding from the operation of any insurance policy, injuries to employees.

> "We agree with the trial court in this view. It is evident that the word 'employee' was used in the insurance policy, in its ordinary and natural sense, as implying the relationship of master and servant. The service rendered by Kantonen was casual and gratuitous. He was driving the car wholly as an accommodation to the appellant, even though he may have had some incidental benefit in the way of pleasure or the hope of future business.
>
> "In construing the language of the policy, if construction is needed, we are to keep in mind the familiar rule, that the construction will be adopted which is most favorable to the insured."

Similarly, in **Sills v. Sorenson, 192 Wash. 318, 73 Pac. (2d) 798,** the Supreme Court held that one who accompanied another in an automobile at his request to witness the payment of a bill, was not an employee. There the exclusion clause of a liability policy with-

drew the benefits if bodily injury was suffered by an employee. The court said:

> "The word 'employee', though more euphonious, has the same legal significance as the word 'servant'. It imparts some sort of continuous service rendered for wages or salary and subject to the direction of the employer or master as to how the work shall be done."

See, also, **Schanen v. Industrial Commission, (Wis.), 228 N. W. 520;**

Louisville, Evansville & St. Louis R. Co. v. Wilson, 138 U. S. 501, 34 L. Ed. 1023;

National Bank v. Fidelity & Casualty Co., 125 Fed (2d) 920;

Continental Casualty Co. v. Shankel, 88 Fed (2d) 819.

The rule of those decisions is of course binding in this case.

Even were the child an employee, which clearly he was not, he was not operating the vehicle.

In the Massachusetts case of **Narcross v. B. L. Roberts Co., 132 N. E. 399,** the owner of a motorcycle sued for damages one who ran into him on the highway. A statute provided that no person shall "operate" any motor vehicle unless the same be registered and one doing so cannot recover damages from another injuring him. The plaintiff had an unregistered motorcycle which he was using. He had taken it to an adjoining town to have it repaired and when

he went to get it the engine was "frozen" so that it wouldn't run. He was pushing the vehicle along the highway when struck from the rear by defendant's truck. Was the plaintiff "operating" the motorcycle? The court said:

> "We are of the opinion that the plaintiff's action in pushing his disabled motorcycle along the street, did not bring him within the language or the purpose of the statute."

In **O'Tier v. Sell, 169 N. E. 624,** it was held that "operate" in the highway law signifies a personal act in working the mechanism of the automobile.

In **Underwood v. State,** an Alabama case, **132 So. 606,** the court held that an automobile is not being "operated" or driven when it remains stationary during the entire time, and no one moves or attempts to move it.

In **Employers Casualty Co. v. Underwood,** an Oklahoma case, **286 Pac. 7,** the question was whether a minor child of prohibited years was "operating" or "assisting in operating" steam machinery. If so, he was to be denied recovery. The trial court held as a matter of law that he was assisting in operating the machine. The supreme court said this legal conclusion was wrong. The child was placing bags in the mechanism of the machine, the lever of which was raised and lowered by a negro. It required the combined

efforts of three, including the child, to perform the completed operation. The court commented that the child did not have anything to do with the machinery except to hook up the bagging in the machine after the bale was compressed. The court said:

> "Nobody was assisting in the operation of the machine except the engineer who handled the throttles, valve or clutch connecting or disconnecting its power. Such a perversion of the established meaning of the word operate in connection with machinery so extensively in use in modern life would be ridiculous."

See, also, **State Farm Mutual Accident Ins. Co. v. Coughran, 92 Fed. (2d) 239;**

Dewhirst v. Conn. Co., 114 Atl. 100;

Ayres v. Harleysville Casualty Co., 2 S.E. (2d) 303;

Witherstine v. Employers Liability Assurance Corp., 139 N. E. 229.

Broadly, is this clause not designed to prevent the added risk when a child of immature judgment, under fourteen years of age, is at times permitted to drive or operate an automobile?

V.

THEORY OF DELAYED NOTICE

There are three sound reasons why there is no merit in this position.

First, the statutory compulsory Public Service Endorsement provided:

"Nothing contained in the policy or any endorsement thereon, **nor the violation of any of the provisions thereof by the insured shall relieve the company from liability hereunder** or from the payment of such judgment."

6 Blashfield, Enc. of Automobile Law and Practice, Sec. 3922, page 316, states:

"Where the statute classifies automobile owners and operators on the basis of manifest financial responsibility or irresponsibility and requires insurance of those who have shown themselves irresponsible, it may properly make the requirement as to compulsory insurance that it be absolute, in the sense that breach of conditions subsequent does not defeat the rights of injured persons; but, as to noncompulsory insurance, such conditions remain valid and effective."
Brodsky v. Motorists Cas. Ins. Co., 170 Atl. 243, 176 Atl. 143.

The claim that the insured did not give timely notice of the accident to the company is not available as a defense against the suit of this minor child.

"Under statutes and policies as to public service motor vehicles, which provide in substance whatever legal rights or equities may subsist between the insurer and the assured by reason of violation of any terms of the policy by the latter, are without effect on the rights of the public claiming under the provisions of the policy or statute, after such claim has been established by a judgment in a court of competent jurisdiction, judgment against the insured is conclusive in favor of the person injured, as against the liability insurer under such a policy, irrespective of any equities between insured and insurer by rea-

son of asserted breach of conditions." **6 Blashfield, Enc. of Automobile Law and Practice, Sec. 4076, page 442.**

American Fidelity & Casualty Co. v. Williams, (Texas) 34 S. W. (2d) 396.

"Under such statutes, whereby policies issued to motor carriers are deemed to be for the benefit of the traveling public, by reason of any violation of the terms of the policy, the rights of the public who claim under the provisions of the policy or statute, after such claim has been substantiated by a judgment at law cannot be affected by legal rights or equities subsisting between the insured and the insurer." **6 Blashfield, Enc. of Automobile Law and Practice, Sec. 4079, page 446.**

Boyle v. Manufacturers' Liability Ins. Co., 115 Atl. 383.

"A different rule applies in the case of a motor carrier's liability policy issued to comply with a statute, the purpose of which is the protection of passengers and members of the public who may be injured by negligence in the operation of public service vehicles, and in such cases the purpose of the statute will not be disregarded or the protection afforded by it diminished by placing it in the control of the insured to nullify them by failure to comply with a condition; and hence a failure to give notice as required by the policy . . . whatever their effect as between insured and insurer, will not deprive the traveling public, for whose protection the insurance is required and effected, of its protection." **6 Blashfield, Enc. of Automobile Law and Practice, Sec. 4080, page 450-1.**

Ott v. American Fidelity & Cas. Co., 159 S. E. 635;

Boyle v. Manufacturers Liability Ins. Co., 115 Atl. 383;

American Fidelity & Cas. Co. v. Big Four Taxi Co., 163 S. E. 40.

"Whatever the form of statute, or whether there is any statute directly ruling the particular situation, the language of the policy itself or of its indorsements or riders may be such an absolute and unequivocal promise to pay the injured person, in the event of injury under the policy, that conditions, such as that of notice, while operative as to the insured, do not vitiate or impair the rights of the persons injured." **6 Blashfield, Enc. of Automobile Law and Practice, Sec. 4080, page 452.**

Second: After pleading affirmatively that it had been prejudiced in its investigation because its insured did not report the injury of January 5th until February 1st, it carried this theory forward by a proposed instruction asking the jury to find as a fact that because of this short delay of notice, prejudice had occurred. But when asked by Judge Neterer wherein or how defendant was so prejudiced, its counsel did not and could not state a single fact supporting the claim. On trial it offered no evidence. Under the theory of its only instruction thereon, there was no fact whatsoever to submit for the jury's determination.

At the pre-trial conference, it was disclosed that immediately upon receipt of notice, the company made its investigation. Every witness to the happening still lived within a few blocks of the scene. They were

all interviewed. Mr. Pound and his son were the only other persons having any information. They also lived in Mount Vernon. They were interviewed. Their records were photographed and serve as exhibits here. Everything pertaining to the entire situation was learned as fully as could have been done a few days earlier. All facts were disclosed. (See Tr. p. 39)

Third: The issue which appellant argues is not the one submitted to the trial judge at the pre-trial conference, nor sought to be submitted to the jury by its proposed instruction, namely, whether or not in fact appellant suffered prejudice. The issue argued is reasonableness of notice. That question was not and is not in this lawsuit. It was not presented as an issue to the judge at the pre-trial conference, nor to the jury by any proposed instruction offered by appellant.

It is true that in the two Washington cases cited: Dowell Inc. Co. v. United Pacific Cas. Co., 191 Wash. 666, at page 682, 72 Pac. (2d) 296, and Horsfall v. Pacific Mutual Life Ins. Co., 32 Wash. 132, 72 Pac. 1028, the court said that "immediate notice" provisions are not to be disregarded where the issue is properly raised that a policyholder has not complied with the contract on which he sues. It is also true that in cases where reasonableness of notice is made

a factual issue, the question of the reasonableness thereof is usually to be determined by the jury. It is likewise true that in the case of **Finkelberg v. Continental Casualty Co., 126 Wash. 543, 219 Pac. 12,** the court said:

> "By the settlement with respondent, Tanaka was not required to give notice, and if he were so required and failed to give notice, this would not in anywise affect the rights of appellant. He could neither destroy the rights of appellant by his agreement with respondent, nor by his negligence to give notice to respondent."

But all of this is far afield.

Appellant says that the issue of reasonableness of notice is a jury question; that this judgment should be reversed and a new trial had wherein that issue is submitted to the jury. The fallacy of its position is two-fold. The theory which it proposed in pre-trial conference and by instruction was that it had been prejudiced in its investigation by a few days' delay. But the facts were that the reverse was true. (Tr. 38-9)

There being no factual issue, the court could not submit its proposed instruction seeking a factual finding that it had been prejudiced. Failure to interject by instruction an issue upon which there is no evidence, is not error. But so to present such an issue, where there is no factual foundation therefor, would be error.

> "It is the settled rule in this jurisdiction that it is prejudicial error to submit to the jury the question where there was no substantial testimony upon which to base the instruction." **Neeley v. Bock, 184 Wash. 135, 50 Pac. (2d) 524.** See compilation of cases cited therein.

Second: Appellant proposed no instruction designed to create a factual issue on whether the contractual requirement of the insured to give notice had been performed faithfully. In the absence of such a proposed instruction, no error can be raised for failure to submit such an issue.

> "If a party desires to have the instructions adapted to a particular view of the case, or to meet a situation which he conceives ought to be covered, it is his duty to specially request them, and in the absence of such a request, a mere omission upon the part of the court to instruct is not error. **Hiscock v. Phinney, 81 Wash. 117 at 123, 142 Pac. 461.**

See, also, **Zolawenski v. Aberdeen, 72 Wash. 95 at 98, 129 Pac. 1090; Sladjoe v. National Casualty Co., 95 Wash. 522, 164 Pac. 203.**

> "Assuming that it was error for the court to fail to instruct upon the issue as to the scale, it was not an error on which the respondent could rely . . . The failure to so instruct was a nondirection and not a misdirection." **Lydon v. Exchange Nat'l Bank, 140 Wash. 317, 248 Pac. 806.**

Where an oral request was made upon the court at the close of a jury charge, to instruct upon an

issue which counsel though had been overlooked, the Supreme Court of the State of Washington said:

> "To countenance that practice would be not only to encourage and invite error, but in many, if not most, instances it would make error inevitable. Judges are but men, with all of the usual human limitations, and trial judges work under a time pressure in order to expedite business. Under such conditions, probably no man living and none known to legal history, could, offhand and upon an unforseen demand, correctly define every one of the niceties and fine distinctions of the law, and so accurately and fully instruct the jury on every legal issue in the case as to avoid error." **Ogilvie v. Hong, 175 Wash. 209, 27 Pac. (2d) 141.**

The exception taken to the instruction given was not sufficient to raise this issue. That exception reads:

> "Also excepts to the instruction of the court removing from the jury the delayed notice given to the defendant in this case. While there was no evidence from the defendant that they were prejudiced, yet delayed notice would indicate that (they) considered they had no coverage, and it should have gone in, at least for that purpose." (Tr. 198.)

Obviously an implication, if this be one, that Bunney didn't consider himself covered, although he gave notice the first of the month following the accident, could in no manner be considered as evidence that the company had been prejudiced.

An objection or exception does not call for the

court himself to formulate an instruction. It does not serve the function of a proposed instruction.

Brammer v. Lappenbusch, 176 Wash. 625 at 635, 30 Pac. (2d) 947.

VI

TRANSFER OF INTEREST IN VEHICLE

Three cases are cited on this point. They have nothing to do with this lawsuit. The subject matter under this heading is thoroughly discussed in the next subdivision of this brief. We merely wish to distinguish those three cases.

Two of these cases involve fire insurance policies. **Continental Insurance Co. v. Michaels,** cited as **13 S.W. 465,** the true citation of which is **13 S.W. (2d) 465,** involved a clause in a fire insurance policy different than the one here in question. These fire insurance policy cases are wide of the mark as they deal with fire hazards where someone other than the insured has control of the premises. The policy in the instant case has to do with the sale of the vehicle where the owner parts with his interest or ownership therein. This the jury found he did not do. The fire insurance policy in the above case, terminated the insurance, cancelled the coverage if the insured became other than unconditional owner, or in case of

any change in the nature of the insurable interest either by sale or otherwise. The owner executed a conditional sales contract which was placed of record and the property was delivered to the vendee. The court said the vendee became the owner of the property and the seller was a mortgagee. At any event, there was no conditional sales contract involved in this case, and under the law of the State of Washington, if there were a conditional sale, the vendee is not the owner and the original owner is not a mortgagee.

Farmers & Merchants Insurance Co. v. Jensen, 76 N.W. 577, was a case decided in 1898. It merely held that the insurance terminated when the owner conveyed the premises by a warranty deed.

Keneagh v. Baker, 284 S.W. 321, was a case where it was contended that a bond given to protect the owner of a vehicle should be construed to cover and protect a third person who bought the principal's car. The court said it would be "preposterous" to hold that the bonding company should be responsible for the acts of another whom it never agreed to bond.

VII

SALE OF TRUCK — PASSING TITLE — BUNNEY NOT OWNER

Pages 42 to 57, Appellant's Brief, are devoted to

an argument that legal title to the 1935 truck and equipment had passed from Bunney before the accident occurred. That was the one factual issue in the lawsuit, and a complete answer is found in this: The jury, by its verdict, established the fact contrary to appellant's contention.

Did the jury have that power?

The Uniform Sales Act in effect in the State of Washington at the time of this occurrence, provided as follows:

Rem. Rev. Stat. 5836-18:

> "Property in specific goods passes when parties so intend.
>
> "(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> "(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

Rem. Rev. Stat. 5836-19:

> "Rules for ascertaining intention.
>
> "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:
>
> "(1) Where there is an unconditional contract to sell specific goods, in a deliverable state, the

property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

(2) Where there is a contract to sell specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

(5) If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon."

With these positive requirements of statute in mind, certain facts are to be remembered. For the property in the goods to pass from Bunney to Pound before delivery to Pound, the parties to the contract must be found to have so intended. This requires a definite, positive and unequivocal meeting of the minds. Pound and his salesman both assert that under the agreement of sale Bunny agreed to make delivery of the property before the sale was complete. (Tr. 173-4; 178-9.) Certainly it cannot be said as a matter of law that the parties had mutually agreed that title and ownership in the property was to pass to Pound before delivery thereof.

This property was not in a deliverable state.

Undisputedly, the truck had upon it a steel body

which was not to be the property of Pound. Undisputedly, a wooden body which was then upon another truck was to become the property of Pound. That wooden body had to be removed; a steel body had to be removed; and the bodies exchanged before the truck was put in a deliverable state. The law says that until this is done, in the absence of positive agreement, title and ownership of the property remained in the seller.

Undisputedly, the property had not been delivered to Pound. The law says that if the contract to sell requires the seller to deliver the goods, the property does not pass until the goods have been delivered. Pound says there was such an agreement. At best, the fact is in dispute. The jury has the right to pass upon the matter and if it believes Pound and his salesman, then a contract existed requiring the seller to deliver, and as he had not done so the law places the ownership of the goods at that time in the seller Bunney. The jury so found. This court does not concern itself with the weight of evidence. **O'Brien Manual of Federal Appellate Procedure, 3rd Ed., p. 188.**

Southwestern Brewery & Ice Co. v. Schmidt, 226 U. S. 162, 33 S. Ct. 68, 57 L. Ed. 170, 173;

Steil, et al, v. Holland, et al. (CCA 9), 3 F. (2d) 776;

Myers v. Brown, et al, (CCA 9), 102 F. 250;

American Film Co. v. Moye (CCA 9), 267 F. 419, 421;

Columbia Agricultural Co. v. Seid Pak Sing (CCA 9), 267 F. 1;

Pennsylvania Casualty Co. v. Whiteway (CAA 9), 210 F. 782, 784;

Gilmore v. McBride (CAA 9), 156 F. 464, 465;

Eastern & Western Lumber Co. v. Rayley, (CCA 9), 157 F. 532, 533;

Duncan v. A. T. & S. F. Ry. Co., et al, (CAA 9), 72 F. 808, 810.

In **Gillingham v. Phelps, 11 Wash. (2d) 492, 119 Pac. (2d) 914,** the Supreme Court of the State of Washington, in interpreting the Uniform Sales Act, held that the time at which the parties intended legal title to pass on sale of personalty was a question of fact for a jury to determine.

Appellant confuses the State registration card with legal title. The State certificate is not legal title. If one sells and passes legal title, he is required to give over this certificate, but the transfer or withholding of that paper does not accomplish or defeat the passing of legal title by sale. The sale and intention of the parties making it, not the transfer of the certificate, passes title. One may actually sell but withhold the certificate. Conversely, one may pass the certificate and yet remain the lawful owner of the vehicle. The Supreme Court of Washington has made this

distinction clear. In **Junkin v. Anderson, 12 Wash. (2d) 58, at page 74, 120 Pac. (2d) 548,** the court said:

> "The statute does not purport to make void transfers accomplished without compliance with the above-mentioned provisions, nor does it make the purchaser's act unlawful . . . respondent may not prevail because the certificate of registration of title did not show ownership in appellant."

See, **Hartford v. Stout, 102 Wash. 241, 172 Pac. 1168; Kimball v. Donohue, 124 Wash. 505, 214 Pac. 1045; 217 Pac. 37.**

The passing of the certificate was merely evidence considered by the jury along with all of the other evidence in the case in determining when and how the parties intended legal title and ownership of the truck to pass. It was not conclusive. But the verdict of the jury is.

See, also, **Cerex Co. v. Peterson (Iowa), 212 N. W. 890;**

Shepard v. Findley, (Iowa), 214 N. W. 676;

Commercial Credit Co. v. McNelly (Dela.) 171 Atl. 446;

Janney v. Bell, 111 Fed. (2d) 103.

THE CASE OF MILES VS. BUNNEY

Appellant devotes three pages to analysis and comment upon this case. It has nothing to do with this litigation, except to afford counsel an opportunity to

suggest that the writer of this brief was counsel in that case and should not be able to reverse his position. We have not done so, but under the law one may do so where, as here, different parties are involved.

15 R. C. L., Sec. 481, page 1008, states:

> "In a second suit against one who was a stranger to the first suit, a party may adopt a position inconsistent with that maintained in the prior proceeding."

That is true as to the ownership of a vehicle doing injury. **Baxter v. Central West Casualty Co., 186 Wash. 459, 58 Pac. (2d) 835. 6 Blashfield, Enc. of Automobile Law and Practice (Supplement) Sec. 4076, p. 184 of Supplement; Whitney v. Employers Indemnity Corp., (Iowa) 202 N. W. 236; 41 A. L. R. 495.**

The question would be one of estoppel which is an affirmative defense not here plead. **Butler v. Supreme Court of Foresters, 53 Wash. 118, 101 Pac. 481.**

All argument is concluded by the admission on page 56 Appellant's Brief. "The Miles case is, of course, not res judicata here, the parties being different . . ."

However, we are not known to this court, and we wish to appear before this tribunal for the first time free from such a suggestion. The original pleadings in that case, the statement of facts on appeal, and briefs, were before Judge Neterer at the Pre-Trial Conference. The complaint alleged that we did not know whether Bunney or Pound owned the 1935 truck

at the date of the accident. For the purpose of that trial, Pound's insurance carrier desired to raise a single legal question: Admitting that Pound was the owner, they wished to claim that Bunney would bear the relationship of independent contractor. To that end and for the purpose of that litigation, counsel for Pound's insurance carrier admitted in open court that we should proceed upon the assumption that Pound was the owner. The sole question briefed and argued was that of the independent contractor relationship. If this court is interested in that 5-4 en banc decision, see **Miles v. Bunney, 10 Wash. (2d) 492, 117 Pac. (2d) 179.** Consideration of that opinion must be had, as was done by Judge Neterer, in light of the way the litigation arose. It should not be read as a judicial determination, had upon disputed facts, that legal title to this truck had passed to Pound.

CONCLUSION

We respectfully submit that Judge Neterer grasped with an accuracy and clarity not had by most of us practitioners, the simplicity and the real issues in this lawsuit. He dealt with it patiently and justly. The judgment upon the verdict and his denial of Motions N.O.V. and for a New Trial should be affirmed.

Respectfully submitted,
WELTS & WELTS
HENDERSON & McBEE
Attorneys for Appellee

Office and P. O. Address:
Mount Vernon, Washington.